

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO: 2013-SA-02002-COA**

**MISSISSIPPI DEPARTMENT OF AUDIT,
STACEY PICKERING, JIM HOOD, CHRIS LOTT,
DAVID HUGGINS, MELISSA C. PATTERSON,
JOSEPH A/ RUNNELS, JR., SANDRA R.
CHESNUT AND HAROLD E. PIZZETTA, III**

APPELLANTS

VERSUS

GULF PUBLISHING COMPANY, INC.

APPELLEE

**CONSOLIDATED WITH
NO: 2014-SA-00894-COA**

**MELISSA C. PATERSON, STACEY
PICKERING, INDIVIDUALLY, DAVID
HUGGINS, INDIVIDUALLY, CHRIS
LOTT, INDIVIDUALLY, MISSISSIPPI
DEPARTMENT OF AUDIT, STACEY
PICKERING IN HIS OFFICIAL
CAPACITY AS STATE AUDITOR FOR
THE STATE OF MISSISSIPPI, HAROLD
E. PIZZETTA, III, MISSISSIPPI
DEPARTMENT OF MARINE
RESOURCES, JOSEPH A. RUNNELS, JR.,
SANDRA R. CHESNUT AND JIM HOOD**

APPELLANTS

VERSUS

GULF PUBLISHING COMPANY, INC.

APPELLEE

**ON APPEAL FROM
THE CHANCERY COURT FOR THE SECOND JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI**

MOTION OF APPELLEE, GULF PUBLISHING COMPANY, INC. FOR REHEARING

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INTRODUCTION

Appellee, Gulf Publishing Company, Inc. (“Gulf Publishing”), files this its Motion for Rehearing and in support would respectfully show pursuant to Mississippi Rule of Appellate Procedure 40(a) that this Court overlooked and misapprehended points of law and facts supporting the Chancery Court’s entry of Final Judgment in favor of Gulf Publishing.

The Court failed to follow the clearly established and time honored requirement that it interpret the Public Records Act liberally in favor of openness and access and strictly and narrowly against exemptions to the Public Records Act.

Even if the public records were exempt as a criminal “investigative report”, which they were not, the records should have been redacted by DMR and the Auditor pursuant to § 25-61-9(2) Mississippi Code and access then given to Gulf Publishing.

The federal district court having custody of the DMR public records pursuant to a federal grand jury subpoena found that not only were the records subpoenaed public records not exempt under the Mississippi Public Records Act, there was no secrecy surrounding those records due to the federal grand jury proceedings.

The Court incorrectly found that DMR and the Auditor were not responsible to pay reasonable attorneys fees to Gulf Publishing.

The Court correctly found that the Harrison County Circuit Court subpoena to the Mississippi Department of Marine Resources (“DMR”) could be satisfied by mailing or delivering a certified copy of the subpoenaed records to the State Auditor, yet the Court did not address why DMR was able to completely shed its responsibility to maintain custody of public records and instead deliver the originals rather than copies to the Auditor **after** DMR had been served with two public records requests by Gulf Publishing.

The Court failed to address Gulf Publishing's argument that DMR violated the Mississippi Archives and Records Management Law of 1981, which required DMR make and preserve its records rather than to ignore the instruction on the Circuit Court's subpoena allowing DMR to maintain its original records and merely furnish the Auditor copies.

The Court correctly found that counsel for Gulf Publishing told counsel for the Auditor that she should move to quash the federal grand jury subpoena for the DMR public records, but the Court failed to address why the Auditor was excused from filing such a motion in the federal district court to give the Auditor time to copy the records for Gulf Publishing. Had it been filed, the jurisdiction, integrity, and interests of both the federal district court and the chancery court would have been upheld.

The Court correctly found as a matter of fact that State Auditor employee, Investigator Huggins, "directed Investigator Lott to transport the subpoenaed records to the federal grand jury in Jackson, which directly violated the Chancery Court order requiring the Auditor to place the records in the custody of DMR so that Gulf Publishing would have access to inspect and copy the records". This finding of the Court in and of itself recognizes that Stacey Pickering and the State Auditor were in civil contempt of both the Chancery Court bench opinion and subsequent written order until they purged themselves of contempt, but the Court failed to find civil contempt in its Opinion.

The Court incorrectly held that the Chancery Court was without authority to find the Auditor in civil contempt and award attorney fees to Gulf Publishing.

The Court incorrectly found that the Chancery Court Judge should have recused herself in the civil contempt proceeding.

1. ON REHEARING THE COURT SHOULD LIBERALLY CONSTRUE THE MISSISSIPPI PUBLIC RECORDS ACT AND HOLD THAT THE RECORDS AT ISSUE ARE PUBLIC RECORDS. IT SHOULD STRICTLY AND NARROWLY CONSTRUE THE CRIMINAL INVESTIGATIVE REPORT EXEMPTION TO THE PUBLIC RECORDS ACT AND HOLD THAT THE RECORDS ARE NOT EXEMPT.

The Mississippi Public Records Act is to be construed liberally in favor of records being “public records” and exemptions to disclosure to be construed strictly and narrowly against secrecy. *Miss. Dep’t of Wildlife v. Miss. Wildlife Enforcement Officers’ Assoc., Inc.* 740 So. 2d 925, 936 (Miss. 1999). Any doubt considering the records being exempt should be resolved in favor of Gulf Publishing Company under the Mississippi Public Records Act. *Miss. Dep’t of Wildlife Fisheries and Parks*, 936.

Put another way, “allowing access to public records is a duty of the public bodies of Mississippi In interpreting [the Public Records Act] our supreme court has held that any questions of disclosure must be construed liberally, while a standard of strict construction must be applied to any exceptions to disclosure”. *Harrison County Development Commission v. Kinney*, 920 So. 2d 497, 502 (Miss.Ct.App. 2006).

At page 14 of its decision, the Court held:

The records sought by GP were investigative reports that fall within the enumerated examples listed in section 25-61-3(f). Investigator Lott testified that the records would disclose the identity of witnesses and impede the ongoing DMR investigation. Investigator Lott also testified that he “used everything that’s listed in [the] subpoena as part of the investigation.” Accordingly, the chancellor erred in finding DMR violated the MPRA when it denied GP’s requests and when it found the investigative-report exemption did not apply. Therefore, we reverse and render the judgment against DMR for violation of the MPRA.

The Court’s analysis is improper. Rather than liberally construe the Public Records Act in favor of openness and the records being “public records”, the Court has construed the Act

narrowly. First and foremost, the records were not generated as an “investigative report”. They were merely business records of DMR used by the Auditor in a criminal investigation. The above quoted section of the Court’s Opinion is at direct odds with the decision from the United States District Court for the Southern District of Mississippi (Jackson Division) in *United States v. Walker*, 2013 WL 6805121 (S.D. Miss.). There, Judge Starrett for the Court liberally construed the Public Records Act as follows:

“The intent of the legislature in enacting the Mississippi Public Records Act of 1983” was to provide “any person ... the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body in accordance with reasonable written procedures....” *Roberts v. Miss. Republican Party State Exec. Comm.*, 465 So. 2d 1050, 1053 (Miss. 1985). Mississippi’s courts liberally construct the statute, the “[a]ny doubt must be resolved in favor of disclosure.: *Miss. Dep’t of Wildlife v. Miss. Wildlife Enforcement Officers’ Assoc., Inc.* 740 So. 2d 925, 935 (Miss. 1999). **The Chancery Court ruled that the DMR records were not exempt from the Public Records Act.** If the State Auditor is not permitted to comply with the Chancery Court’s order, a substantial goal of Mississippi public policy will be thwarted – a public policy generally shared by the federal government.

(Emphasis added.)

On rehearing the Court should consider the public records at issue to be exactly what they are: business records of DMR created and maintained in the ordinary course of business and not for the purpose of any criminal investigation. The Chancery Court so found.

On rehearing the Court should liberally construe the records to be “public records” and narrowly construe the “investigative reports” by adopting the analysis of the Chancery Court in the following respects. The Court should recognize the similarity in records used by the Auditor and records used by the federal grand jury in determining just what is or what is not an “investigative report”. Often times the federal government has two parallel lines of investigation

on the same subject, one involving a grand jury and another involving something independent of a grand jury. The parallel investigation independent of the grand jury investigation is “**subject to disclosure** even though the same information obtained may be presented and used in the grand jury investigation.” (Emphasis added.) Federal Rule of Criminal Procedure 6(e). [R. 330-34.] Therefore, even though the records in this case may have been used in state and federal criminal investigations, Gulf Publishing was entitled to access since the records were “subject to disclosure”.

Federal Rule of Criminal Procedure 6(e) involving grand jury investigations does not draw a “veiled secrecy... over all matters occurring in the world that happen to be investigated by a grand jury”. Federal Rule of Criminal Procedure 6(e); *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F. 2d 1368, 1382 (D.C. Cir.) [R. 330-34.]

The records were not compiled by DMR as an “investigative report” or for any other reason even remotely connected to any state or federal criminal investigation. The records did not become a part of a law enforcement “investigative report” compiled by the Auditor simply because they were subpoenaed and seized by the Auditor. *NLRB v. Robbins Tire & Rubber Co.*, 98 S.Ct. 2311, 2320-2321 (1978).

The Court should order a rehearing and adopt the Chancery Court’s analysis that no exemption applied to Gulf Publishing records request.

2. ASSUMING ARGUENDO THE PUBLIC RECORDS WERE EXEMPT AS A CRIMINAL “INVESTIGATIVE REPORT”, THE RECORDS SHOULD HAVE BEEN REDACTED PURSUANT TO §25-61-9 MISSISSIPPI CODE.

On rehearing the Court should liberally construe the records to be public records and narrowly and strictly construe the criminal “investigative report” exemption by considering § 25-61-9(2) Mississippi Code which provides:

(2) If any public record which is held to be exempt from disclosure pursuant to this chapter contains material which is not exempt pursuant to this chapter, the public body shall separate the exempt material and make the nonexempt material available for examination and/or copying as provided for in this chapter.

Even if the public records were a criminal “investigative report”, which they were not, the DMR and the Auditor should have redacted the records to exclude the criminal “investigative report” and make the balance of the records available to Gulf Publishing thereby at least partially complying with the Public Records Act and accomplishing the openness it demands.

3. SINCE THE PUBLIC RECORDS ARE SUBJECT TO NO CRIMINAL “INVESTIGATIVE REPORT” EXEMPTION, ON REHEARING THE COURT SHOULD AWARD GULF PUBLISHING ITS REASONABLE ATTORNEYS FEES UNDER THE MISSISSIPPI PUBLIC RECORDS ACT AGAINST THE DEPARTMENT OF AUDIT, STATE AUDITOR AND DMR.

If the Court on rehearing interprets the public Records Act liberally in favor of openness, determines that the public records at issue are not exempt as being a criminal “investigative report”, the Court should award Gulf Publishing its reasonable attorneys fees and the \$100.00 penalty provided by the Mississippi Public Records Act at § 25-61-15 Mississippi Code, which provides:

Any person who shall deny to any person access to any public record which is not exempt from the provisions of this chapter or who charges an unreasonable fee for providing a public record may be liable civilly in his personal capacity in a sum not to exceed One Hundred Dollars (\$100.00) per violation, plus all reasonable expenses incurred by such person bringing the proceeding.

On rehearing Gulf Publishing should be awarded its attorneys fees of \$36,783.50 and costs of \$1,249.95 against the Department of Audit, State Auditor and DMR. It should also be awarded attorneys fees and costs on appeal.

4. DMR SHOULD HAVE MAINTAINED CUSTODY AND CONTROL OF ITS BUSINESS RECORDS, PARTICULARLY AFTER HAVING BEEN SERVED WITH GULF PUBLISHING'S REQUESTS FOR PUBLIC RECORDS UNDER THE PUBLIC RECORDS ACT BEFORE SERVICE OF EITHER THE CIRCUIT OR FEDERAL DISTRICT COURT SUBPOENAS.

On rehearing the Court should address DMR's failure to maintain custody and control of the records it generated, particularly since Gulf Publishing had already served DMR with two (2) requests for public records. Gulf Publishing made the first request prior to DMR being served with the Auditor's subpoena from the Harrison County Circuit Court. Gulf Publishing had already sued the Auditor for the DMR public records before it was served with the federal grand jury subpoena. Rather than maintain custody and control of public records to comply with Gulf Publishing's public records requests, it completely disregarded its obligations under law and turned over all the records to the Auditor.

This is a violation of the Mississippi Archives and Records Management Law of 1981. Section 25-59-15(b)(c) Mississippi Code provides:

It shall be the duty of each state agency and each appointed or elected state official to:

- (a) Cooperate with the department in complying with the provisions of this chapter.
- (b) Establish and maintain an active and continuing program for the economical and efficient **management of records**.
- (c) **Cause to be made and preserved records** containing adequate and proper documentation of the

organization, functions, policies, decisions, procedures and essential transactions of the agency or office and designed to furnish the information necessary to protect the legal and financial rights of the government and of the persons directly affected by the agency's activities.

(§ 25-59-15 Mississippi Code.) (Emphasis added.)

Furthermore, § 25-59-19 provides:

All records created or received in the performance of public duty and paid for by public funds are deemed to be public property and shall constitute a record of public acts.

5. THE STATE AUDITOR AND DEPARTMENT OF AUDIT SHOULD HAVE MOVED FOR PROTECTIVE ORDER OR TO QUASH THE FEDERAL GRAND JURY'S SUBPOENA.

Gulf Publishing respectfully urges the Court on rehearing to reconsider its ruling that “the Auditor was faced with a choice of complying with the chancellor’s bench ruling and protective order or complying with the federal subpoena. Any noncompliance with the chancellor’s bench ruling or protective order was not willful or contemptuous”. In fact, the Auditor was not forced to choose to comply with the Chancery Court orders or with the federal grand jury subpoena. He could have complied with both simply by filing a motion for protective order or to quash the federal grand jury subpoena. The filing in and of itself would have given the Auditor more than enough time to copy the DMR public records for access of Gulf Publishing. This is clearly borne out by the federal district court in *U.S. v. Walker* returning the nonexempt public records to the Chancery Court.

It is absolutely uncontradicted in the record that the Auditor knowingly and intentionally disregarded the Chancellor’s orders.

6. THE STATE AUDITOR AND DEPARTMENT OF AUDIT WERE IN CIVIL CONTEMPT OF THE CHANCERY COURT'S BENCH OPINION AND WRITTEN ORDER ENTERED IN THE CASE.

At page 65 of the Chancery Court's final judgment, the Auditor was found to be in civil contempt with the following holding:

ORDERED AND ADJUDGED that Defendants Mississippi Department of Audit and State Auditor, Stacey Pickering, were found to be in civil contempt beginning on November 4, 2013 and to have purged said civil contempt on December 5, 2013 and are further liable for reasonable attorneys fees, costs, and expenses resulting from said civil contempt.

However, at pages 18 and 19 of its opinion, the Court of Appeals found the above quoted language from the Chancery Court's final judgment to be a finding of a criminal contempt. In support of that finding on appeal, the Court cited *R.K. v. J.K.*, 946 So. 2d 764, 778 (Miss. 2007). Gulf Publishing requests the Court to reconsider its opinion and in support would show that in *R.K.* the Mississippi Supreme Court *affirmed* the Chancery Court's decision *not* to hold a party in a domestic relations case in civil contempt. "A chancellor has substantial discretion in deciding whether a party is in contempt." *R.K.*, 777 citing *Lahmann v. Hallmon*, 722 So. 2d 614, 620 (Miss. 1998).

The Court did not afford the Chancellor "substantial discretion". It should do so upon rehearing. *In re Contraction, Exclusion and Deannexation of City of Grenada*, 876 So. 2d 995 (Miss. 2004) recognized the Chancery Court had broad discretion and was in the best position to determine whether a party was in contempt, and affirmed the Chancery Court's finding of civil contempt against four City of Grenada councilmen who disobeyed the Court's deannexation order.

The Chancery Court is infinitely more competent to decide the matter than an appellate court. *In re Contraction*, 1004. The Chancery Court in *In re Contraction* fined the councilmen \$100.00 per day each “beginning on November 18 and continuing until they were no longer in contempt”. In that case, as in the instant case on appeal, the Chancery Court was clearly within her discretion in finding the Auditor and Stacey Pickering in *civil* contempt for the time they disobeyed her order until they purged themselves of civil contempt by having the federal district court return the DMR records to the Chancery Court. The Chancery Court’s finding of civil contempt was limited to the time at which Stacey Pickering and the Auditor purged themselves of contempt on December 5, 2013 and not thereafter.

At section 89 of the Chancery Court’s Final Judgment, the Chancery Court ruled:

It comes down to this: If... a party could disobey a judgment and upon that disobedience defend on the ground that in his opinion the judgment was erroneous, we would be well to do away with courts and allow men with all of their differences and diversities of opinion, just and unjust, to take what they could by force. **We would cease to have the rule of law; we would have the rule of the jungle.**

At section 90 of the Final Judgment, the Chancery Court ruled:

The Court further finds and concludes the release of the records by the Federal District Court to the Auditor and the Auditor’s subsequent release of the records to the Chancery Court purged the civil contempt of the Auditor.

In support, the Chancery Court cited

Mississippi Dep’t of Wildlife, Fisheries & Parks v. Mississippi Wildlife Enforcement Officers’ Ass’n, Inc., 740 So. 2d 925, 937 (Miss. 1999). *State v. Blenden*, 748 So. 2d 77, 87 (Miss. 1999). (Court upheld monetary sanctions against the Government relying upon *Selleck v. S.F., Cockrell Trucking, Inc.*, 517 So. 2d. 558, 560 (Miss. 1987), citing *Ladner v. Ladner*, 436 So. 2d 1366, 1370 (Miss. 1983) (“... even where there is no specific statutory authority for imposing sanctions, courts have an inherent

power to protect the integrity of their processes, and may impose sanctions in order to do so.”)).

At section 92 of the Chancery Court Judgment ruled that :

[B]ecause some of the events surrounding the Auditor’s contempt as well as the advice of General Hood to the Auditor were not personally observed by the undersigned Chancellor, the Court finds and concludes there is a question of constructive criminal contempt. A trial, if any, on that matter should be conducted in front of another Judge.

The State Auditor and Department of Audit would have been in civil contempt of the Chancery Court’s orders even if they had been erroneously entered. *City of Grenada*, 1005-06.

Since the Final Judgment limited contempt of State Auditor Stacey Pickering and the Department of Audit from November 5 through December 5, 2013 when he sought release of the public records from the federal district court in Jackson, the contempt was civil rather than criminal.

The Chancery Court Judgment found evidence of criminal contempt by the State Auditor but reserved decision on criminal contempt finding at section 90 of the Final Judgment that the “matter should be conducted in front of another Judge”.

In limiting the contempt to civil rather than criminal, the Chancery Court correctly found that in a case involving both civil and criminal contempt it could hear the civil but not the criminal contempt matter, citing *In re E.K. v. Hinds County Youth Court*, 20 So. 3d 1216 (Miss. 2009) [R. 355.]

Using the manifest error standard of review, the Court should order a rehearing on civil contempt of the State Auditor and Department of Audit. *In re E.K.*, 1221.

7. SINCE THE CHANCERY COURT FOUND THE AUDITOR IN CIVIL RATHER THAN IN CRIMINAL CONTEMPT, THE CHANCERY COURT JUDGE SHOULD NOT HAVE BEEN RECUSED.

There is no evidence of any bias, passion or prejudice requiring the Chancery Court Judge to have been recused. The alleged ground for recusal was that the Chancery Court Judge could not hear any request to find the Auditor in criminal contempt. As previously discussed, the Chancery Court Judge found that she would recuse herself in any subsequent criminal contempt hearing. Since her Judgment was limited to civil contempt only, the Chancery Court Judge should have not been recused.

CONCLUSION

For the above and foregoing reasons, Gulf Publishing respectfully requests that the Court grant a new hearing and thereafter to affirm the Chancery Court's Final Judgment with attorneys fees and costs.

Respectfully submitted this the ____ day of April, 2016.

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CERTIFICATE OF SERVICE

I Henry Laird, do hereby certify that I have electronically filed the foregoing Brief of Appellee using the ECF-System which sent notification of same to all counsel of record:

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